

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-7232

In The

United States Court of Appeals

For The Second Circuit

HERBERT FEDERMAN et al.,

Plaintiffs,

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY et
al.,

Defendants-Appellees.

-and-

STUART C. GOLDBERG and JACOB ASCHKENASY,

Additional Defendants on Cross-Claims,

STUART C. GOLDBERG,

Additional Defendant on Cross-Claims, Appellant.

*On Appeal from the United States District Court for the
Southern District of New York.*

ORIGINAL

OCT 13 1977

BRIEF FOR APPELLEE JACOB ASCHKENASY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-7232

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-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY,
et al.,

Defendants-Appellees,

and

STUART C. GOLDBERG and JACOB ASCHKENASY,

Additional Defendants
on Cross-Claims,

STUART C. GOLDBERG,

Additional Defendant on
Cross-Claims-Appellant.

APPELLEE, ASCHKENASY'S BRIEF

The appellee, Jacob Aschkenasy, in accordance with
FRAP 28(b) adopts the statement and issues as set forth in
the opinion of MacMahon, J. at appendix 174a-183a.

POINT I

The stay in the order appealed from was an ordinary interlocutory order; it was not a "final decision" under Title 28 U.S.C. §1291.

In appellant's Point I, page 12 of his brief, he argues that his appeal from Judge MacMahon's order (App.174a-183a) was an appeal of right, which could be justified solely under 28 U.S.C. §1291.

The rule as stated in Moore's Federal Practice, ¶110.20 [4.2] page 249 is as follows:

"A district court may stay an action pending before it (1) to await developments in an action previously commenced involving the same issues, or (2) to oblige the parties to bring a state court action in order to secure a definitive ruling as to what the state law is.

A stay of the first description is

'...incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.'

An order granting or denying such a stay is not ordinarily regarded as the grant or denial of an injunction. This is so whether

the prior action is pending in a state court, another federal court, or in the same federal court. The stay is an ordinary interlocutory order. As such, it is potentially reviewable under 28 USC §1292(b), and mandamus will lie to correct an abuse of discretion. But it is not reviewable as of right under 28 USC §1292(a)(1)."

Accord: Mottolese v. Preston (2 Cir.1949)
172 F.2d 308,309.

Moore, in the excerpt cited by appellant at the bottom of page 12 of his brief, appears to make a distinction between a stay granted by a federal court where a state court action is pending, (which Moore says is not appealable as a "final decision") and a stay granted by a federal court where a state court action has not yet been started. (Moore Federal Practice ¶110.20 [4-2] p. 251.) Moore cited in support of such fine distinction, Idlewild v. Epstein (1962) 370 U.S. 713 affirming 289 F.2d 426 (2 Cir 1961) *[1]

We suggest that there is no logical or legal basis for the distinction. The true test is and we urge it should be:

*[1] Idlewild v. Epstein is called a "derelict" which "should be expressly cleared from the scene" (MTM, Inc. v. Baxley 420 U.S. 789,807. The unsettled nature of the Idlewild holding is further pointed up in Justice Douglas's dissent in the MTM case, at p.809 where he says, "Perhaps Idlewild should be distinguished or overruled, as my Brother White urges, but I remain unconvinced." See also Judge Gurfein's comment that "Idlewild is of doubtful validity after MTM v. Baxley", in Cordova v. Reid (2 Cir. 75) 521 F.2d 621, 623, F.N.i.

Has the stay ousted the litigant
from the enforcement of his remedy
and rights? Is he out of Court?

If the stay operates only as an interlocutory order, it is
not an order granting an injunction, for purposes of 28 U.S.C.
§1292(2)(1).

Judge MacMahon's order preserves the remedy and rights
of appellant, Goldberg, (App. 182a) against the possible im-
pact of the statute of limitations, saying:

"Under these circumstances, we think
plaintiff [Goldberg] should retain the
same right to prosecute this action in
state court that he would have had if
we had permitted the case to proceed here."

The court retained a suspended jurisdiction over the case
pending the commencement and final determination of an action
or actions in State Court encompassing all of the state claims,
cross-claims and counterclaims of the parties (App. 182a-183a).

The litigants are not "out of court" *[2] The appellant,
Goldberg has only an ordinary tort action available to him.
Whether it is or will ever be cognizable under state law, re-
mains a very tenuous question; but whatever his remedy and

*[2] This is not a case like Younger v. Harris 401 U.S.37 (1971)
where the abstention mandated dismissal. As stated in
Justice White's concurring opinion in MTM Inc. v. Baxley
420 U.S. 799, 806 n.i, the deferral of relief is in some
cases equal to a final decision.

rights might be, he has them all preserved and open to litigation in the state court. This preservation of rights is far different from the circumstances which faced the courts in Idlewild *[3]; there this Court of Appeals said it had no power to entertain an appeal from a stay order granted by a judge who should not have granted it, since a federal question existed, and relegated the litigants to the convening of a three-judge court.

In the case here on appeal, there is no issue of a federal question, nor any involvement of constitutionality, federal or state. If such questions were here in issue, we would agree that this court might entertain an attack on a stay order. But, absent such issues, we think Moore, as cited at page 12 of appellant's brief, was wrong; the Supreme Court thought the Court of Appeals had the right to consider the appeals because they felt that

"...it [is] impermissible for a single judge to decide the merits of the case, either by granting or withholding relief."
(370 U.S. 715)

The stay in that case was tantamount to a denial of relief, because the plaintiff in Idlewild *[3] sought only an injunction against a state statute which he claimed was repugnant

*[3] 289 F2d 426.
Please also see footnote *[1] at page 3 of this Brief; the present validity of Idlewild is greatly doubted.

to the U.S. Constitution; staying him was absolutely equal to the denial of all relief, since the attorney general of the state had already ruled that the plaintiff's business was illegal under the A.B.C. Law.

In Ferguson v. Tabah (2 Cir. 1961) 288 F.2d 665, this Court said that the granting or denial of a motion for a stay ordinarily is not an appealable order (p.671) but rests within the discretion of the district judge (p.672).

In Weiner v. Shearson, Hammill (9 Cir. 1975) 521 F.2d 817 the Court recognized that a state court action was pending, but it declined to accept the dichotomy in reasoning suggested by Moore (p.12 appellant's brief); instead that Court said, at 521 F.2d 820:

"The abstention doctrine, it should be noted, is no way dependent on the presence or absence of a concurrent state court action between the parties."

And that court recommended to the district court to do precisely what Judge MacMahon did in his order, (at 521 F.2d 821):

"[8] Turning now to the case at bar, we first note that even if abatement were proper in this case, dismissal of the action was not the appropriate method. Instead the district court should have stayed the action pending either the outcome of the state action or a timely suggestion by either party that the reasons which had prompted the stay had ceased to apply. Shareholders Management Company v. Gregory, 449 F.2d 326 (9th Cir. 1971)."

In Serrano v. Playa Associates (1 Cir. 1968) 390 F.2d 593, the Court was dealing with an appeal from a stay, as in our case; there was a state court action in being, but with other parties than those in the federal court; the court treated the case as if there were no state action pending and dismissed the appeal "for lack of appellate jurisdiction."

The stay is a "hold-fast" device which preserves Goldberg's rights (assuming he has any) in the federal court during his pursuit of his claim in the state court. The stay under the saving clauses in the order of Judge MacMahon is an ordinary interlocutory procedure, not decisive of the action, and hence not appealable.

POINT II

In answer to appellant's Point II

In his Point II, starting at p.13 of the appellant's brief, Goldberg would have this court swallow his bait. He has concocted a questionable tort claim and now seeks to induce this court to believe that, somehow, his claim has attained the quality of a "federal question." In the caption of his Point II, he has the boldness and audacity to argue that

"...federal question jurisdiction exists independently of their ancillary or pendent character."

By his use of thousands of words, [including the self-aggrandizing, yet comedic, repetition of "Professor Goldberg" 67 times in his "Amendment to Amended Answer" (App. 149a-173a)] in the statement of his claim, all he has to offer is an action sounding in defamation. *[4]

It is true that the alleged tortious conduct took place during the preparation of an S.E.C. registration for a stock issue. But the Supreme Court of New York, in New York County is quite knowledgeable in the precedents relevant to securities law; the New York County judges are well-versed in applying federal securities law to local or state law situations.

In Weiner v. Shearson Hammill (9 Cir. 1975) 521 F.2d 817, the Court found no difficulty in permitting a federal judge to stay a federal court action to permit an Arizona state court to deal with the issues. There were complex Securities Act issues involved; the Court of Appeals said at page 822:

"The state court does have power to grant the parties relief under the 1933 Act on the state law counterclaim, and in doing so, it

*[4] Like the basis in Morrison v. N.B.C. 19 N.Y.2d 453 (1967)

also may or may not resolve the 1934 Act issues. See Klein v. Walston & Co. 432 F.2d 936 (2d Cir. 1970). Cf. Watson v. Roberts, Scott & Co. 466 F.2d 1348 (9th Cir. 1972)."

Moreover the Goldberg claim is a tort claim only. He claims to have suffered emotional damage due to his being employed by the Sitomer firm where he had only a smallish part to play in advising that law firm on two, perhaps three marginal areas of law during the preparation of an S.E.C. registration. His work and his advice play no part at all in his tort claim. His claim is surrounded by a thicket of words, which all boil down to an "unconventional tort."

Goldberg admits (p.18 of his brief) that he does not have a 10b5 claim; nor does his claim involve the creation of any precedent binding on the Securities and Exchange Commission; no such connection is evident. The Commission has no interest in a private suit for damages for fraud.

Even if a federal act, like the Securities Act of 1933 must be construed in a state court action, appellee Aschkenasy submits that a court (like the Supreme Court, New York County), well-versed in a large volume of brokerage and securities litigation, can be relied on to use good judgment in applying federal statutes or case law to Goldberg's claim.

POINT III

In answer to appellant's Point III

[At the outset we ask the court to note appellant's use of the words "....to dismiss Goldberg's ancillary counter-claim and cross-claims" in its Point III caption. We state this is a transparent device whereby the appellant hopes to persuade this court that Judge MacMahon's order put Goldberg out of court. The order appealed from was a deferral not a dismissal.]

We shall confine ourselves to a discussion of the pendent jurisdiction argument as presented in Goldberg's brief pages 24-40 (assuming this court decides that the stay order is appealable, as of right.)

The class action has been eliminated from this case. All that now remains is the "complaint" in Goldberg's tort action against the Sitomers, Aschkenasy and Empire defendants; that action is in its most initial stage. There has been no answer or pleading to the "complaint" (App. 149a); everything is still at the threshold. We emphasize that the affirmative action of Goldberg is still in its infancy to counterbalance any contention that delay or inordinate expense or unfairness

would ensue if the court refused to accept pendent jurisdiction.

The cases dealing with the district court's exercise of its discretion to rule on a case under its pendent powers, appear to hinge such exercise of discretion on existence of diversity. We do not deny that if a trade-mark case is coupled with a counterclaim for damages, the court has the power to decide the issues on the counterclaim, even after the federal part of the case has been settled.

Kavit v. A.L. Stamm Co. (2 Cir. 1974)
491 F.2d 1176

Goldberg, appellant, relied on United Mine Workers v. Gibbs 383 U.S. 715 (1966) as a precedent. But, as Judge Friendly pointedly remarks in the Kavit Case, 491 F.2d 1176, 1179:

"In the cautionary part of his opinion in Gibbs, 383 U.S. at 726-727, which perhaps is not read enough, Mr. Justice Brennan noted that dismissal of common law claims might be merited if 'pretrial procedures or even the trial itself reveal a substantial hegemony of state law claims.' The Justice added that 'recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.' 383 U.S. 727, 86 S.Ct. 1139. If it appears that the federal claims are subject to dismissal under F.R. Civ.P. 12(b)(6) or could be disposed of on a

motion for summary judgment under F.R. Civ.P. 56, the court should refrain from exercising pendent jurisdiction absent exceptional circumstances. Indeed, this is essential to avoid a result where, as has been happily said, 'the dog would be wagged by his tail.'"

In Rogers v. Valentine (2 Cir. 1970) 426 F.2d 1361, the district court's refusal to accept pendent jurisdiction was affirmed. The state claim was dismissed. At an earlier stage of the case, Judge Cannella made an order dismissing the federal cause of action but retained jurisdiction over the common law action under the doctrine of pendent jurisdiction; the aggrieved party contended that such ruling bound the trial judge and said he was compelled to give Judge Cannella's ruling credence. The Court of Appeals rejected this reasoning and held that the trial judge had the right to exercise discretion against retention of jurisdiction; the court said:

"Whether to exercise pendent jurisdiction is a matter for the discretion of the district court. The trial judge acted well within that discretion in dismissing appellant's remaining state claims without prejudice to their renewal in the state courts. See Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); United Mine Workers of America v. Gibbs, 383 U.S. 715, 726-727, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)."

A great deal of time has been spent on this case, but not on Goldberg's affirmative claim. He may cite the many days

spent on depositions; but this must not impress the listener, because he was deposed on procedures instituted by the plaintiffs in the class action. There has been a new start in relation to his own claim, which is now only just commencing.

We believe that the courts have been led to accept pendent jurisdiction in diversity cases because of a feeling that 28 U.S.C. §1332 compelled the courts to do so. It was felt to be a mandate from Congress, and perhaps it is a factor which should tip the scales toward acceptance of pendent jurisdiction where the diversity continues to exist. But in the case at bar, Goldberg, if he were confined merely to his tort claim, could not resort to the federal court since his claim is not based on a federal statute; nor could he show diversity.*[5]

It was not an abuse of judicial discretion for Judge MacMahon to have stayed the Goldberg cross-claim and to have directed him to try out the issues in the state court, in the meanwhile protecting Goldberg's claim against destruction be-

*[5] At the time of the service of Goldberg's cross-claim, the Empire defendants were citizens of Nebraska, but Goldberg, the Sitomers and Aschkenasy were all citizens of New York. Diversity among these parties does not exist and can never be attained. The Congressional mandate implicit in 28 USC §1332 (for a federal court to accept and complete a cause where diversity exists) should not be used to retain this cause where diversity can never exist.

cause of the possibility that the statute of limitations, for some reason not discerned by the court, might destroy Goldberg's claim.

This court, in Phillips, Nizer etc. v. Rosenstiel 490 F.2d.509 (2nd Cir. 1973) noted that when the residue of an action remains for pendent jurisdiction in a diversity action, such jurisdiction would be declined if complex and as yet undecided issues of local law will be involved in arriving at a decision (see 490 F.2d 515):

"Most important of all, decision requires exploration of a difficult field of New York law with which, because of its proximity to the exception for matrimonial actions, federal judges are more than ordinarily unfamiliar."

This is one of the reasons assigned by Judge MacMahon in his stay order (App. "Opinion" 179a-181a).

And the Rosenstiel decision further supports the view that Judge MacMahon properly exercised his discretion in requiring Goldberg's tort action to be brought in the state court. (see 490 F.2d 516):

"Despite the expansive language used thirty years ago in Meredith v. Winter Haven, 320 U.S.228, 236-238, 64 S.Ct. 7, 88 L.Ed. 9 (1943), we do not believe that the Supreme Court today would demand that federal judges waste their time exploring a thicket of state decisional law in a case such as this. Some movement away

from Meredith took place in Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), and again in Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835 (1968). Although these cases concerned state law issues important to the state itself, courts of appeals, inspired no doubt by feelings akin to those we have voiced, have stayed diversity actions for resolution of difficult state law problems by the state courts even when the issues were of concern mainly to the parties." (underscoring ours)

When a judge is confronted with a pendent jurisdiction problem, he is thoroughly justified in declining to accept pendent jurisdiction, all other things (such as diversity) being present, if the case so retained cannot be decided by recourse to established state law.

"It should be noted, too, that when a federal court is faced with a difficult problem of state law, that court can hold the case in abeyance while the state question is determined in an adjudication in the state court. citing:

Albertson v. Millard 345 U.S.242 (1953)

Spector Motor Service, Inc. v. McLaughlin
323 U.S.101 (1944)

Chicago v. Fieldcrest Dairies 316 U.S.168 (1942)

RR Com. of Texas v. Pullman Co.
312 U.S. 496 (1941).

Thompson v. Magnolia Petr. Co.
309 U.S. 478 (1940).

This idea was articulated in Meredith v. Winter Haven 320 U.S.228 (1943) where the court, at page 236, stated:

'So too a federal court....may stay proceedings before it, to enable the parties to litigate first in the state court questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented.'

(41 Minn Law Review 1, at 4, note 14 [1956])

Judge Frankfurter stated the rule to be observed as follows:

"On that crucial issue, we are told, there is no Illinois law. By what seems to me undesirable judicial administration, the ascertainment--for all I know the formulation--of Illinois law is committed to a federal court which in the very nature of things can render only a tentative and indecisive judgment.

Tentative and indecisive, because whatever view the Court of Appeals for the Seventh Circuit takes on this question may be authoritatively supplanted by the only court that can finally settle the issue, namely, the Supreme Court of Illinois. Such a decision from the Illinois Supreme Court can readily be solicited by the plaintiff through the Illinois declaratory judgment procedure. It is precisely the kind of controversy for which the utility of the device of a declaratory judgment has been so fulsomely acclaimed. Instead of availing itself of this modern procedure, the Court makes itself a party to a discord which passeth understanding.

No doubt the Court of Appeals may tentatively answer this question of Illinois law so far as the immediate parties are concerned. But it is

not conducive to the interests of law in general that this Court should compel a decision in a federal court which tomorrow or the day after may be definitely contradicted by the State court with the final say. I would remand the case to the Court of Appeals to be held by it until the plaintiff seeks with all deliberate speed a decision on the crucial question of the case in the Illinois courts."

Sutton v. Leib (1951)

342 U.S.402: concurring op. at 413-414.

POINT IV

Appellant repeatedly emphasized the fact that Judge MacMahon made his order staying the federal action, sua sponte. We believe Judge MacMahon acted in the finest traditions of the judiciary in this circuit in making such order. As Judge Learned Hand observed in Brown v. Walter (1933) 62 F.2d 798, at 799-800:

"A judge, at least in the federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end when necessary."

The Thibodaux decision, 360 U.S.25 (1959) was an abstention also made sua sponte, which was affirmed by the Supreme Court without criticism.

Judge MacMahon was justified in exercising his discretion sua sponte, because of an evident desire on his part to stop the further waste of time, energy and money on more and more procedural steps in the federal court case. His action was incisive but considerate of the litigants' ultimate interests.

POINT V

Appellee, Aschkenasy adopts and approves the arguments in the briefs of the co-appellees, to the extent that such arguments are directed to points other than those already covered in this Brief.

We have adopted the arguments of the other appellees to avoid burdening this Court with cumulative, and perhaps repititious arguments. Our omission to answer appellant Goldberg's last two points should not be interpreted as an inability to do so, but should be construed only as dictated by a desire to save this Court's time.

This adoption by reference to the briefs of our co-appellees is in accordance with FRAP 30(i).

CONCLUSION

1. The stay order of Judge MacMahon is an interlocutory order and is not appealable, as of right, under 28 U.S.C. §1291, as claimed by appellant. The appeal should be dismissed.

2. [Should this Court decide to accept this appeal notwithstanding the arguments offered in our POINT I:]

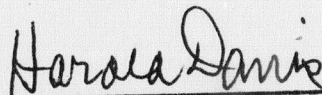
There is no "federal question" involved in the appellant's claim; his contention that primary federal jurisdiction applies to his tort action is without foundation.

3. The granting of the stay was a provident exercise of the district court's discretion in deciding to abstain from jurisdiction under the pendent doctrine.

4. Absent a dismissal of the appeal by this Court, we ask it to affirm the order.

Dated: New York, N.Y.
October 17, 1977

Respectfully submitted



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COURT OF APPEALS
SECOND CIRCUITHERBRT FEDERMAN , et al.,
Plaintiffs,

- against -

IMPORE FIRE AND MARINE UNSURANCE CO.,
Déve
Defendants -Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 13th day of October, 1977 at 1. 919 Third Ave; N.Y., N.Y.
2. 469 Fifth Ave; N.Y., N.Y.
3. 116 John St; N.Y., N.Y.

deponent served the annexed

Resp Bsrief R E

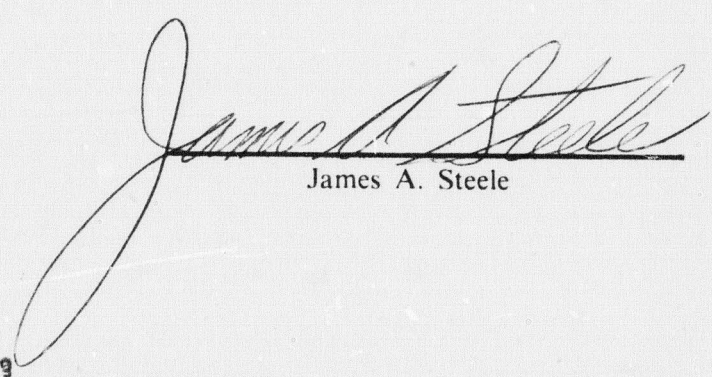
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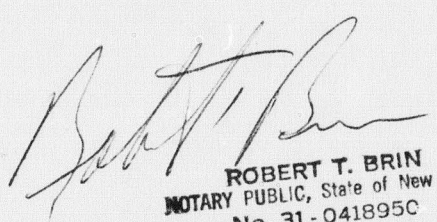
2. Aranow Brodsky Bohlinger Benetar & Einhorn

3. D'Amato Costello & Shea, Esqs.

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 13th
day of October., 19 77


James A. Steele


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-041895C
Qualified in New York County
Commission Expires March 30, 1979